

27 APR 1972
OGC 72-0593UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Civil Action 69 Civ. 200

INTERNATIONAL BUSINESS)
MACHINES CORPORATION,)

OGC Has Reviewed

Defendant.)

AFFIDAVIT

Richard Helms, Director of Central Intelligence, being first duly sworn, deposes and says:

1. I was duly appointed by the President and confirmed by the Senate as Director of Central Intelligence, and as such the head of the Central Intelligence Agency. I assumed that office on June 30, 1966, and I continue to serve in that capacity.

2. The statutory authorities and responsibilities of the Director of Central Intelligence are set forth in section 102(d) of the National Security Act of 1947, as amended, 50 U.S.C. 403(d), and subsection (3) of that section provides: "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

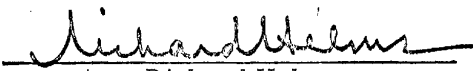
3. In the interests of the security of the foreign intelligence activities of the United States and in order to further implement section 403(d)(3) of Title 50, section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. 403g, provides that: "...the Agency shall be exempted

from...the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries or numbers of personnel employed by the Agency:..."

4. Documents of the type described in Pretrial Order No. 2 and Pretrial Order No. 3, which under those Orders would be made available for inspection and copying by counsel for the defendant, have been found in the files of the Central Intelligence Agency. I have been fully apprised regarding the nature and contents of those of the documents which have been classified "Top Secret", "Secret" and "Confidential" in accordance with Executive Order 10,501 and the necessity for their continuing to remain so classified. I confirm the classification decisions made with respect to those classified documents and the necessity for their being continued. In addition, I have examined a representative sampling of those classified documents. I affirm that the classification designation as given them is necessary in terms of Executive Order 10,501 so as to protect the interests of national defense; and that they would continue to be so classified pursuant to Executive Order 11,652, effective June 1, 1972, so as to protect the interest of national security.


On the basis of the foregoing, I have determined that production by the Central Intelligence Agency of any classified material that would fall within the scope of Pretrial Order No. 2 or Pretrial Order No. 3 would be inconsistent with my statutory responsibilities to protect intelligence sources and methods, incompatible with the statutory exemption conferred upon the Agency against disclosing information regarding its organization, functions and names of its personnel, and prejudicial to the security interests of the foreign intelligence activities of the United States. Accordingly, pursuant to the authority vested in me as Director of Central Intelligence, I

formally assert the privileged status of that material and I must respectfully decline to permit its production.


Richard Helms
Director of Central Intelligence

STATE OF VIRGINIA)
) ss
COUNTY OF FAIRFAX)

Subscribed and Sworn to before me this 27th day of April,
1972.


Notary Public

(SEAL)

My commission expires 5 October 1973.

OGC:RJB:ks

DISTRIBUTION:

Orig & 2 - Dept. of Justice (Mr. Widmar)

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RJB Signer

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Orig & 2 were taken by courier to Justice -
Mr. Widmar on 27 April 1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant.

Civil Action

69 Civ. 200

PROPOSED ORDER AMENDING AND
CLARIFYING PRETRIAL ORDERS NOS. 2 AND 3

The parties having been heard, and the Court being duly advised, it is hereby

ORDERED, ADJUDGED AND DECREED that, in plaintiff's production of documents from Government files pursuant to defendant's pending and any subsequent request for the production of documents under the Federal Rules of Civil Procedure, and specifically including the pending production pursuant to Pretrial Orders Nos. 2 and 3, the following procedures shall govern the production and inspection until further order of this Court:

(1) Documents designated as containing sensitive commercial or proprietary information shall be made available for defendant's inspection and copying. Defendant shall take all steps necessary to prevent the disclosure of such documents or any information obtained from such documents to any person other than an attorney engaged in the conduct of this litigation and to persons assisting the said attorneys in the conduct of this litigation. Such documents and information shall be made available only to those persons

ORDERS NOS. 2 AND 3

that counsel deems necessary in the conduct of the litigation, and all attorneys and all such persons shall be notified of the entry of, and the terms of this Order before they are permitted access to any such documents or information, and each such attorney and each such person shall agree not to use such documents or any information contained in such documents for any purpose other than for use in this litigation;

(2) Documents designated as containing classified information may be examined on behalf of defendant only by duly authorized persons who have the requisite security clearances necessary for an examination of such classified material. All such materials and any copies thereof will be handled by defendant under appropriate security conditions until declassification has been effected.

Dated at New York, New York, this 10th day of May, 1972.

s/ David N. Edelstein

DAVID N. EDELSTEIN
Chief Judge

*Under safeguarding
Classified +
in formation*

*27 APRIL
1972*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant.

Civil Action

69 Civ. 200

*As Filed
4 60 J.E.L.*

MOTION FOR AN ORDER AMENDING AND
CLARIFYING PRETRIAL ORDERS NOS. 2 AND 3

JUSTICE'S MOTION & MEMORANDUM

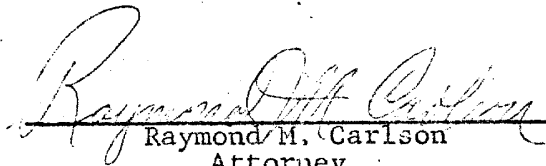
Plaintiff, United States of America, having secured for defendant the availability for inspection of documents responsive to its Rule 34 Motion, as contained in Pretrial Orders Nos. 2 and 3, but having been unable to reach agreement with defendant as to the handling and safeguarding of certain documents containing material subject to executive privilege and documents containing sensitive commercial information, hereby moves to modify Pretrial Orders Nos. 2 and 3 as follows:

(1) Documents subject to a claim of statutory or executive privilege shall not be produced at this time, and resolution of any disputed claims of executive or statutory privilege shall be deferred to the period after all documents produced by plaintiff without claims of privilege have been examined by defendant, after all other methods of discovery have been completed, and after the issues have been finally defined in pretrial proceedings;

(2) Documents designated as containing sensitive commercial or proprietary information shall be disclosed only to defendant's attorneys and to those persons working

directly with such attorneys in the defense of this litigation, with those persons who do examine such materials being restricted from making their contents known to other personnel of defendant or making any commercial use of such materials or the information contained therein; and

(3) Documents designated as containing classified information shall be disclosed only to duly authorized persons who have the requisite security clearances, and any copies made by defendant shall be handled in accordance with established security procedures.


Raymond M. Carlson
Attorney
Department of Justice

Dated: April 27, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant.

Civil Action

69 Civ. 200

MEMORANDUM SUPPORTING GOVERNMENT'S MOTION
FOR AN ORDER AMENDING AND CLARIFYING
PRETRIAL ORDERS NOS. 2 AND 3

*AS Filed
by CWA*

By its Motion for an Order Amending and Clarifying Pretrial Orders Nos. 2 and 3, plaintiff seeks the aid of this Court in resolving certain problems concerning the production, inspection, and safeguarding of various classified, proprietary and commercially sensitive materials found in Government files. Such materials are within the broad scope of defendant's pending request for production of documents under the Federal Rules of Civil Procedure, even as limited by Pretrial Order No. 2. Nevertheless, a substantial number of the documents falling within the scope of the discovery demand cannot be produced because of statutory or executive privilege, or can be produced only if disclosure is limited and controlled. No agreement among counsel has been attainable to permit discovery to go forward under the necessary conditions. Therefore, plaintiff proposes that the Court modify its previously-entered discovery order.

The proposed solutions outlined in this memorandum, which are embodied in the accompanying Order, are intended to apply to future as well as pending document production to IBM pursuant to discovery running against the Government, insofar as the need for such solutions can be foreseen on the basis of present experience.

Plaintiff's instant Motion supplants and revises its draft motion dated April 13, 1972, which was presented to the Court during the pretrial hearing on April 14, 1972. The signed originals of the affidavits of M. Shy Meeker of General Services Administration, George E. Morris of RCA Corporation and J. Fred Buzhardt of the Department of Defense, all of which are mentioned in this memorandum, are attached to the original of the April 13, 1972 draft motion. For the convenience of the Court and counsel, copies of these affidavits are also appended to this memorandum.

I. Background

As the Court will recall, at the pretrial conference held on February 23, 1972, plaintiff argued that the Request for Documents initially served on the Government by IBM was much too broad in its demands and did not meet the requirements of specificity and reasonable scope demanded by the Federal Rules of Civil Procedure. It was pointed out that this failure of the defendant IBM to draft its Request for Documents within the bounds of reasonableness rendered compliance by the Government a practical impossibility. Plaintiff's conclusions in this regard were reached after months of consultation and unsuccessful negotiation among counsel for IBM,

counsel for the Government, and representatives of various of the large number of Government agencies involved, seeking to narrow IBM's Request to such proportions as to make compliance possible.

With the guidance of the Court, however, it was agreed at the pretrial conferences held on February 23 and March 16, 1972, that the Government would undertake to initiate steps to provide defendant with whatever documents the Government could select immediately, consistent with IBM's initial Request, saving all problems regarding production for the consideration of the Court. Anticipating that there would be problems encountered in making the production, counsel for the Government advised the Court at that time that he did not think that IBM's desired discovery from Government agencies could be totally accomplished the first time through. The Court, acknowledging this, agreed that "I do not think you can, either." (Feb. 23, Tr. pp. 36-37)

The Court's Pretrial Order No. 2 embodied this first wave of production, and provided for the production of documents from fourteen Government agencies, agencies initially selected on the basis of statements made by IBM counsel as to the "key agencies" of concern to IBM.

Department of Justice attorneys assigned to this case have devoted many hours and much effort to arranging production of the records sought by IBM. Excellent responses have been received from many Government agencies and their counsel, and thousands of documents are now, and have been for some time,

available for IBM's inspection. In particular, full production is now available from the National Institutes of Health and the Advanced Research Projects Agency. Virtually full production is also now available from the General Services Administration, the Federal Bureau of Investigation, the Army Materiel Command, the National Aeronautics and Space Administration, the Department of Commerce and the Atomic Energy Commission.

No inspection by IBM has yet been made, however, except for its review of Department of Justice files during the weeks of April 10 and 17, 1972. This is because of the position taken by IBM's counsel that they do not wish, assertedly for the sake of convenience, to undertake any inspection of Government documents while the conditions of their access and use with respect to some of the documents remain to be clarified. IBM's position in this regard is not, we believe, totally consistent with our initial approach to this production, for it was our belief that all parties had agreed with this Court's suggestion that the Government should:

. . . proceed to produce, and reserve all of those documents or for that matter all matters concerning which there can be no negotiation or settlement for a later date; but I do not think it moves this case towards a trial by sitting back and waiting for a complete definition and limitation at this time. (Feb. 23, Tr. p. 32)

II. Discovery Problems Encountered by the Justice Department Under the Initial Production

In securing production of documents from the initial fourteen agencies, plaintiff's attorneys have found that the documents called for fall into the following:

categories:

(a) "National Security Documents" - documents in the possession of certain agencies, such as the National Security Agency, the Central Intelligence Agency, and the Federal Bureau of Investigation, which cannot be produced or identified in any manner because of the overriding interests of national security.

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(b) "Classified Documents" - documents which plaintiff has in the normal course of its governmental operations classified as "Confidential," "Secret," or "Top Secret," or which have been similarly classified. CITZ
No 10, 101

(c) "Proprietary Documents" - documents which contain proprietary information submitted by third parties in confidence, and which relate to the financial, commercial or other confidential plans and activities of vendors.

(d) "Source Selection Evaluation Documents" - documents prepared by and for the use of Government agencies in connection with their responsibilities for procurement evaluations and decisions, pursuant to federal statutes and regulations, in which the Government agency sets forth its purchasing policy considerations and opinions, and comparative rankings of prospective vendors in terms of cost, performance, and other criteris.

(e) "Releasable Documents" - all documents produced by plaintiff for inspection and copying other than the documents described in items (a) through (d).

The last, and largest, category of documents, which it is expected will comprise most of the Government's

production, poses no problems. However, production of the first four categories of documents presents certain major problems, each of which is discussed in some detail below.

First, regarding the "National Security Documents," officials of the National Security Agency (NSA) and the Central Intelligence Agency (CIA) have informed the Department of Justice attorneys that most or all material concerning the highly specialized use of computers by those agencies is extremely sensitive ^{*military*} ~~national security~~ ^{*as x*} information, disclosure of which would endanger national security. ^{*in large numbers and methods*} 1/ The directors of both NSA and ~~CIA~~ have concluded that they must invoke claims of statutory and executive privilege in regard to the information sought (though CIA has agreed to produce certain of the information). The FBI has invoked a similar claim as to one limited area of documentation out of its entire production. 2/ These affidavits point out, in substance, that automatic data processing equipment is utilized extensively in the information gathering and cryptological activities of these agencies, and that materials which describe these activities are among the most sensitive of all such files. Plainly, the affidavits establish that the national security interests of the United States bar disclosure.

1/ Plaintiff's counsel first informed the Court of this fact during the April 14, 1972 pretrial conference (April 14 Tr., pp. 31-32).

2/ The affidavits furnished by the Directors of these three Governmental agencies, Vice Admiral Noel A. M. Gayler, Director of the National Security Agency, Richard Helms, Director of the Central Intelligence Agency, and J. Edgar Hoover, Director of the Federal Bureau of Investigation, are attached to this memorandum. ✓

Moreover, specific federal statutory provisions make clear Congress' intent that disclosure of such internal information concerning these two agencies should not and may not be compelled under authority of any law of the United States. Public Law 86-36, 73 Stat. 63, relating to NSA, provides that:

Sec. 6. (a) Except as provided in subsection (b) of this section, [3/] nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

*CITE
TO USC 403G
Bureau
mutual*

→ Title 50, § 403g of the United States Code, relating to the CIA, provides that:

In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d) (3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5. June 20, 1949, c. 227, § 7, 63 Stat. 211. [4/]

3/ Subsection (b) subjects certain engineering and scientific positions to reporting requirements of 10 U.S.C. § 1592.

4/ A 1968 decision in the Fourth Circuit, Heine v. Raus, 399 F.2d 777 (4th Cir., 1968), cert. den. 402 U.S. 914, outlines procedures there followed in invoking the protection of this statute and recognizes the danger of disclosure, or burden upon the exercise of the privilege, inherent in overly exacting requirements upon the agency in making the claim.

Even in the absence of these statutes, it would seem clear that the material sought is fully subject to a claim of executive privilege under the criteria set forth in United States v. Reynolds, 345 U.S. 1, 9-11 (1953), and the opinion in Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 313 (D.C.D.C. 1966), aff'd, Carl Zeiss, Jena v. Clark, 123 U.S.App. D.C. 10, 384 F.2d 979, cert. den. 389 U.S. 952 (1967).

The affidavits submitted on behalf of NSA and CIA^{SECRET} also interpose an overriding national security objection to identifying the filing systems and procedures, and personnel responsible therefor, which would be required for them to respond to Pretrial Order No. 3. Thus, for the same grounds set forth above with respect to documents of these agencies, the instant motion seeks to relieve NSA and CIA from any compliance with Pretrial Order No. 3.

Second, regarding "Source Selection Evaluation Documents," certain Defense agencies entrusted with special responsibilities for purchasing and procurement policy decisions at the highest levels have advised us that they must invoke executive privilege to prevent disclosure of materials which would reveal the intimate details of opinions expressed and factors considered in major purchasing decisions of the Government. These documents are so competitively sensitive as to warrant resistance to production for that reason alone. Their specificity in terms of competitive information is sufficiently precise as to make the information in them a tool or weapon against competition, so important that it could be decisive in a given situation where, as

here, the party seeking access is already dominant in the market. Furthermore, these highly sensitive materials differ in kind from proprietary materials, containing as they do internal, intimate details of this particular Government purchasing function.

Similar claims of executive privilege have been upheld in cases such as Machin v. Zuchert, 316 F.2d 336, 339-341 (D.C. Cir. 1963) (memoranda reflecting recommendations and deliberations on Air Force policy); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 660-662 (D.C. Cir. 1960) (recommendations as to Renegotiation Board decisions and policies); and Kaiser Aluminum & Chem. Corp. v. United States, 157 F.Supp. 939, 944-948, 141 Ct. Cl. 38 (1958) (advisory opinion on intra-office policy).

Why shut ✓

Third, regarding the "Classified and Proprietary Documents," certain bids and other materials submitted to the Government by smaller competitors of IBM would, in the view of both the Defense agencies and the Department of Justice, constitute or contain sensitive commercial proprietary information inappropriate for disclosure to a dominant competitor like IBM except upon a showing of a most extreme necessity and under careful safeguards. The serious anticompetitive consequences of the disclosure of such information and the adverse effects of revealing or making public proprietary bid and other procurement materials and information are set forth in the attached affidavits of George E. Morris, Secretary, RCA Corporation, M. Shy Mecker, Commissioner, Federal Supply Service, General Services Administration, and

*Protection
order
materials*

J. Fred Buzhardt, General Counsel, Department of Defense. In addition, several Government agencies, including the Department of Defense, have expressed the fear that disclosure of such materials may subject them to criminal prosecution under the terms of Section 1905 of Title 18, U.S.C.A. 5/

In a series of cases dating back at least to Judge Kaufman's opinion in United States v. Lever Brothers, 193 F.Supp. 254, 256-258 (S.D.N.Y. 1961), and continuing through Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 998-999 (10th Cir. 1965), as well as many cases in the Federal Trade Commission, 6/ courts and administrative agencies have recognized that parties to antitrust litigation should be allowed access to sensitive commercial information obtained by the Government from their

5/ Title 18, § 1905, U.S.C.A., provides as follows:
"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

6/ See cases collected in Moore-McGormack Lines, Inc. v. United States, 413 F.2d 568, 586-587, n. 34 (Ct. Cl. 1969).

competitors only if such information is clearly relevant, and then only in such a manner as to limit disclosure only to those persons who must know in order to defend the litigation adequately. It has also been noted in the Lever Brothers case, supra, and in United States v. American Optical Co., 39 F.R.D. 580, 586-587 (N.D. Cal. 1966), that if access is granted only to commercial information which is three or four years old or older, the likelihood that disclosure will result in substantial prejudice to competitors is considerably lessened.

Some material to be produced (which may or may not contain proprietary information) bears Government security classifications, as to which the need for safeguards is apparent even though no compelling danger to the national security is involved in its inspection by duly authorized persons. The concern that this classified material be inspected by persons with appropriate security clearances only, and that safeguards be adopted to prevent disclosure of such materials, is set forth in the attached Buzhardt affidavit.

It should be noted that the Freedom of Information Act, 5 U.S.C. §552(b), expressly exempts material:

(1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;

* * * * *

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.

See Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970).

III. Suggested Procedures for Resolution
of These Discovery Problems

First, as to the "Classified and Proprietary Documents," plaintiff suggests that a protective order be entered limiting disclosure of proprietary material to defense counsel and IBM employees working specifically on this case; and that those employees be barred from copying such information, disclosing it to other IBM employees, or making any use of it except in defense of this litigation. Plaintiff believes that the entry of such an order would relieve the producing agencies, their officials and employees, of any liability under 18 U.S.C.A. §1905, by affording appropriate protection to the interests of the parties originally submitting the materials to the respective agencies, and protecting the commercial proprietary interests of the Government agencies involved.

The order should restrict the examination of "Classified Documents" to those duly authorized persons who have the requisite security clearances and should require that such materials be handled according to established security procedures.

Second, as to National Security Documents and Source Selection Evaluation Documents, plaintiff urges this Court to order discovery to go forward without production in these categories, deferring until a later stage of the case any resolution of disputes as to claims of privilege. There are compelling reasons for postponing these decisions:

- (1) Such deferral would be consistent with the handling of IBM's claim of privilege as to more than 40,000 internal documents.

(2) The issues in this litigation are not yet so precisely defined as to permit a firm determination as to the relevance of the documents being withheld, the necessity for production in the light of factors such as defendant's own knowledge, their possible cumulative effect in light of other discovery, and the likelihood that sufficient information may be obtainable from other sources or through other means of discovery.

(3) The courts have previously ruled that claims of executive privilege may call for evaluation of important competing policies and resolution of complicated factual issues, but that "where necessity is dubious, a formal claim of privilege . . . will have to prevail." United States v. Reynolds, *supra*, at p. 11. Plaintiff does not believe that the CIA and NSA statutes allow for any balancing of competing interests; but even as to the Source Selection Evaluation Documents as to which a claim of executive privilege is made, it is not yet the appropriate time to weigh all the competing considerations since relevancy and necessity cannot yet be finally determined.

(4) If the issues are deferred, some or all of them may eventually become moot through agreement of the parties, availability of other sources of information, mere passage of time making disclosure less sensitive, declassification or other change in security requirements or other now unforeseeable developments.

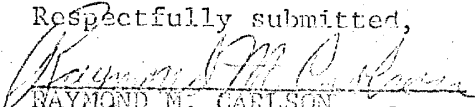
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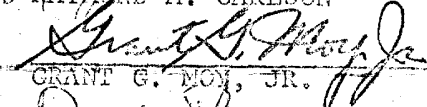
Plaintiff wishes to stress that this memorandum is not intended as a comprehensive statement of its legal position in favor of a claim of privilege for any particular document or class of documents now being withheld

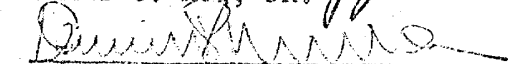
from production. Rather, the intent has been to urge to the Court that there is a substantial body of material which will be produced, that there are significant legal, policy and factual questions affecting the production of certain classes of documents, and that it will be in the best interests of the orderly progress of this case that decision on such privilege questions as becomes unavoidable be deferred until the further progress of discovery and pretrial refines the issues of relevance and necessity. If at some later time the non-production of certain classes of documents has become an important unresolved issue impeding the progress of the case, plaintiff would of course be anxious that it then be resolved, though only after the full briefing and argument which questions of such national importance deserve,

For all the above reasons, plaintiff urges that this Court grant plaintiff's motion to modify the discovery order, so that IBM can begin inspection of the voluminous Government documents now available under the conditions and safeguards described herein, and so that other important discovery aspects of this litigation may proceed apace.

Respectfully submitted,


RAYMOND M. CARLSON


GRANT G. MOY, JR.


KENNETH E. NEWMAN

Attorneys, Department of Justice

Dated: April 27, 1972

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES,

Defendant.

69 CIV 200

AFFIDAVIT OF M. SHY MEEKER

COMMONWEALTH OF VIRGINIA)

COUNTY OF ARLINGTON)

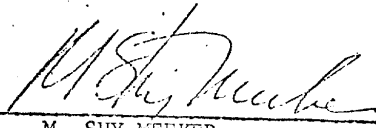
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M. SHY MEEKER, having first been duly sworn, deposes and
says as follows:

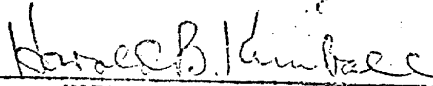
1. That I am the Commissioner of the Federal Supply Service,
General Services Administration.
2. That the Federal Supply Service is compiling that portion
of the documents and records in the Office of Automatic Data Management
Services which are required to be responsive to Pretrial Orders 2 and
3.
3. That certain of the documents required to be submitted in
response to Pretrial Order 2 are proprietary in nature in that they
contain information provided to the General Services Administration in
confidence, and the disclosure of which to the general public would be
detrimental to the interests of the firm or person that provided the
information to the General Services Administration. Further, that the
vendor/vendee relationship between those persons and firms and the
General Services Administration would be damaged.

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4. That in order to protect the proprietary interests of the aforesaid persons and firms, a protective order of the court to the effect that such documents as are required to be produced pursuant to the said Pretrial Orders be used only for purposes of this litigation and not for any business or other purpose; and that such documents or any copies thereof not be shown to any person other than those persons who are required to view them for purposes of the defense of this litigation is desired.


M. SHY MEERER

Subscribed to and sworn before me HAROLD B. KIMBALL, a notary public, in and for the County of ARLINGTON, Commonwealth of Virginia, this 10th day of April 1972.


NOTARY PUBLIC

My Commission Expires Sept. 10, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----:
UNITED STATES OF AMERICA, :

Plaintiff, :

Civil No. 69-200

v. :

INTERNATIONAL BUSINESS MACHINES, :

Defendant. :

-----:
AFFIDAVIT

State of New York)
) ss.:
County of New York)

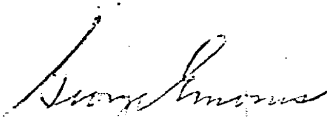
George E. Morris, being duly sworn according to law, deposes and says:

1. I am the Secretary of RCA Corporation and, as such, I am authorized to make this Affidavit on its behalf.
2. In cooperation with the Department of Justice in its investigation of the EDP industry, RCA Corporation submitted to the Department at the Department's request over 1100 documents.
3. All of these documents were submitted in confidence by RCA Corporation

in reliance on the assurance that they would be used only by the Department of Justice in that investigation.

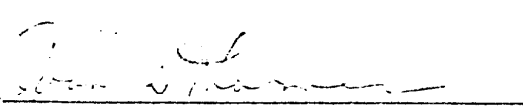
4. Of the documents submitted, seven in particular, are of a proprietary and highly confidential nature. These seven are listed on the attachment to this Affidavit.

5. The disclosure of the contents of those seven documents to members of the EDP industry or to the public in general would have serious repercussions to RCA Corporation, because of the information contained therein. The documents reveal the future long-range plans and projections of RCA Corporation, its financial capabilities and requirements, its projections of profits, earnings, expenses, and indebtedness, all of which go far beyond its participation in the EDP industry. Those documents also contain discussions of other business ventures and problems of RCA Corporation. The disclosure of this information, could be harmful to RCA Corporation.



GEORGE E. MORRIS

Subscribed and sworn to before me
this 12th day of April, 1972.



JOAN D. THORNER
Notary Public, State of New York
No. 31-3376575
Qualified in New York County
Commission Expires March 30, 1973

- 2 -

SCHEDULE A

Memorandum entitled "Computer Systems Division," marked "Company Confidential" at top of page; dated September 17, 1971 on last page (8 pages); such document was submitted to Raymond M. Carlson by Robert L. Werner, RCA Executive Vice President and General Counsel, by letter of October 8, 1971.

Memorandum entitled "Computer Systems Division," bearing handwritten date of "9/17/71" in upper right hand corner of first page (8 pages); such document was submitted by Jerome J. Shestack of Schnader, Harrison, Segal & Lewis to Raymond M. Carlson by letter of December 6, 1971.

Memorandum entitled "Computer Systems Division" marked "Company Private" in upper right hand corner of first page, no date (13 pages); such document was submitted by Jerome J. Shestack of Schnader, Harrison, Segal & Lewis to Raymond M. Carlson by letter of December 6, 1971.

Memorandum entitled "Reasons for RCA's Participation In The Computer Industry" marked "Company Private" in upper right hand corner of first page, dated August 27, 1971 (4 pages); such document was submitted by Jerome J. Shestack of Schnader, Harrison, Segal & Lewis to Raymond M. Carlson by letter of December 6, 1971.

Memorandum entitled "Computer Systems Division" marked "Draft - Private and Confidential" in upper right hand corner of first page, no date (10 pages); such document was submitted by Jerome J. Shestack of Schnader, Harrison, Segal & Lewis to Raymond M. Carlson by letter of December 6, 1971.

Memorandum on RCA internal correspondence stationery from Jim Johnson to Ed Donegan, dated September 14, 1971 entitled "The Future Growth of the Computer Industry" (2 pages) with 6 pages of charts attached; such document was submitted by Jerome J. Shestack of Schnader, Harrison, Segal & Lewis to Raymond M. Carlson by letter of December 6, 1971.

Memorandum on RCA internal correspondence stationery from Chase Morsey, Jr. to Robert W. Sarnoff, Anthony L. Conrad dated September 1, 1971 entitled "Computer Systems Division Divestiture Feasibility Study" (2 pages), with 2 pages of charts attached; such document was submitted by Jerome J. Shestack of Schnader, Harrison, Segal & Lewis to Raymond M. Carlson by letter of December 6, 1971.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
) Civil Action No. 69 Civ. 200
Plaintiff,)
) AFFIDAVIT
v.)
) of
INTERNATIONAL BUSINESS)
MACHINES CORPORATION,)
)
Defendant.) Honorable J. Fred Buzhardt

Honorable J. Fred Buzhardt, being duly sworn, deposes and says:

1. I am the General Counsel of the Department of Defense and in that position serve as the Chief legal officer responsible for all legal services to be performed within and involving the Department of Defense.

2. In connection with the above captioned case, I have examined some of the documents required to be produced from the files of the Department of Defense pursuant to Pretrial Order No. 2. Among such documents are (1) "classified documents" which in the normal course of operations have been classified "CONFIDENTIAL", "SECRET", and "TOP SECRET", and (2) "proprietary documents".

3. "Classified documents" are those which contain official information or material requiring protection against unauthorized disclosures in the interest of the national defense or foreign relations of the United States herein collectively termed "national security". Disclosure of classified documents to unauthorized persons could endanger the national security of the United States, and in the interest of national security these documents must be protected. To assure such protection, the inspection of classified documents can only be permitted by persons possessing requisite security clearances in accordance with the provisions of Executive Orders 10501 and 11652. These Executive Orders provide that knowledge or possession of classified information shall be permitted only to persons whose official duties require such

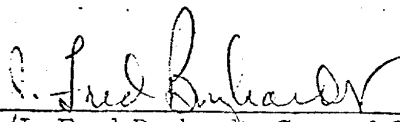
access in the interest of promoting national defense and only if they have been determined to be trustworthy. The responsibility is placed upon the head of the Executive Department to determine the trustworthiness of the individual to receive classified information and to afford such individual a "security clearance".

4. As used herein "proprietary documents" are documents which contain the categories of information described in 18 U. S. C. 1905 and are considered proprietary for that reason. Disclosure of "proprietary documents" may, unless otherwise provided by law, be a criminal violation of 18 U. S. C. 1905, which prohibits officers or employees of the United States from disclosing confidential information submitted to them which concerns trade secrets, processes, operations, style of work and the like. In addition, unless the Department of Defense respects the confidence of the people who do business with it and protects "proprietary documents" from inappropriate disclosure, the availability of such information will diminish to the detriment of this Department and national defense. The protection of such proprietary material is also required for the purposes of safeguarding data and information useful for competitive reasons to competitors of the persons who have submitted such data and information in response to procurement and supply or other needs of the Department of Defense. It is essential to the competitive system of procurement and the confidence of suppliers and potential suppliers, that such persons not suffer loss or damage from the disclosure of such information provided in confidence to the Department of Defense and not lose confidence in the continued integrity of the system of procurement designed and protected by law for Department of Defense procurement and operations.

5. There are materials required to be produced from the files of the

Department of Defense pursuant to Pretrial Order No. 2 comprised of detailed evaluations of proposals by suppliers, which if revealed to a supplier or a supplier's personnel could provide to that supplier a distinct competitive advantage over other potential suppliers in future procurement actions by the Department of Defense. A competitive advantage so obtained would impair the effectiveness of the procurement system of the Department of Defense and impair the capability of the Department of Defense to fulfill the mission of providing an adequate defense of the nation. To prevent such an impairment of the national security, it will be necessary for protection to be provided to such evaluation materials against disclosure to any supplier of the Department of Defense in the automatic data processing field.

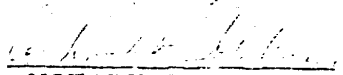
6. Accordingly, orders of the court requiring the Department of Defense to provide "classified documents", "proprietary documents" and "evaluations of proposals" should make appropriate provisions for the protection of these three types of information during the process of inspection of such material and until such time as the need and requirement for such protection no longer exists.



J. Fred Buzhardt, General Counsel,
Department of Defense

Sworn to and subscribed before me

this 10 day of June, 1972.



NOTARY PUBLIC

My commission expires _____.

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STATE OF MARYLAND)
) SS
COUNTY OF ANNE ARUNDEL)

Vice Admiral Noel A. M. Gayler, being duly sworn, deposes and says:

1. I am Vice Admiral Noel A. M. Gayler, the Director of the National Security Agency since August of 1969.

2. The National Security Agency was established by Presidential Directive in 1952 to perform highly specialized technical functions in support of the intelligence activities of the United States. The National Security Agency prescribes certain security principles, doctrines and procedures for the United States Government, and organizes, operates and manages certain activities and facilities for the production of intelligence information.

3. The intelligence information available to or produced by the National Security Agency is the single most important source of current intelligence on foreign military actions, capabilities and intentions. It is also important to the United States conduct of foreign political and economic affairs. The continued availability of such information is particularly endangered by disclosure of its contents, its sources, or the methods of its acquisition and analysis. In recognition of the unique nature of this classified information, Congress has specifically provided in Section 798 of Title 18, United States Code, that its prejudicial use is a criminal act punishable by a fine of not more than \$10,000 or by imprisonment not to exceed 10 years. Section 798 also penalizes the disclosure of classified information concerning

the design, construction, or use of any device used by the United States for communication intelligence purposes.

4. Automatic data processing equipment is indispensable in accomplishing the security and intelligence responsibilities of the National Security Agency. By complicated classified programming instructions computers are used to build models of cipher devices and to simulate code systems used throughout the United States Government. Computers produce actual cryptographic material for the civil and military agencies of the Government. Computers are the principal intelligence information handling resource, and also form an integral part of a secure communications system of the United States and its allies.

5. Much of the automatic data processing resources of the National Security Agency is commercially available, general purpose equipment. In the selection of equipment for application to unique intelligence problems, and in the development of necessary software routines, the National Security Agency produces surveys, analyses, and reports of the type described in pre-trial Order No. 2. These documents describe the intelligence problems requiring the acquisition of specific computers, and compare the ability of specific devices to perform the required cryptologic functions. These documents bear the highest authorized national security classifications, and their dissemination is strictly limited and controlled within the National Security Agency and the Government to persons having a need to know for national security purposes.

6. The cryptologic activities of the government are so sensitive that in addition to the criminal statute, 18 U.S. Code, section 798, prohibiting the prejudicial use of this particular kind of classified information, Congress has passed a statute to protect even the records, organization, and personnel structure of the National Security Agency, which is the principal cryptologic agency of the government. Public Law 86-36 (50 U.S. Code 402, Note) provides that no law "shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with

respect to the activities thereof or of the names, titles, salaries, or numbers of the personnel employed by such agency." A third statute, P. L. 88-290, 50 U. S. Code 831 ff. prescribes a comprehensive personnel security system and associated procedures to control the access to National Security Agency information by persons having a need-to-know for national security purposes. Finally, with specific reference to disclosure of documents concerning procurement of computers, the Committee on Government Operations of the House of Representatives said in its Report No. 802 in 1965 that it is of paramount importance that agencies with intelligence or security responsibilities maintain their security in line with appropriate Federal statutes and as the President might direct.

7. As Director of the National Security Agency, I am personally responsible for compliance with the aforementioned public laws and the orders of the President governing the physical protection of and the access to the classified information of this Agency. I have been fully apprised of the nature of the documents of the National Security Agency which would be subject to inspection and copying by representatives of the International Business Machines Corporation, pursuant to pretrial orders #2 and #3 of this Court. In addition, I have personally examined a representative number of these documents. Within the meaning and intent of the statutes cited above, I have concluded that it would be prejudicial to the national security interest of the U. S. to make available for inspection or copying documents of the National Security Agency or to make available information of the kinds described in pretrial orders #2 and #3 of this Court.

8. I have also concluded that the documents and information of the National Security Agency of the United States of the kinds described in pretrial orders #2 and #3 of this Court are uniquely privileged documents of the Executive Branch of the United States which should be used only for national security purposes, and should not be disclosed for any other purposes.

/s/ NOEL GAYLER

Noel A. M. Gayler, Vice Admiral, USN
Director, National Security Agency

Sworn to and subscribed before me

this 27th day of April, 1972.

Arthur A. Luth
NOTARY PUBLIC Laurel Md.

My commission expires 1 July 1974.

AFFIDAVIT

In response to a pretrial order requiring disclosure in United States v. International Business Machines Corporation, 69 CIV. 200, Southern District of New York, I caused a review to be conducted of the files of the Federal Bureau of Investigation to locate any document that might be pertinent to the order.

Document selection was made in accordance with the order and those not prohibited from disclosure will be made available. One particular area of documentation, limited in volume to a few pages, contains information covered by specific statutory protection against disclosure and which concerns a matter of overriding national security interest will not be disclosed.

John Edgar Hoover
John Edgar Hoover
Director, Federal Bureau of Investigation

4-26-72
(Date)

Subscribed and sworn to on 4/26/72 before
the undersigned at Washington, D. C.

Notary Public - Washington, D. C.

Approved For Release 2002/08/06 : CIA-RDP78-01092A000100050024-9

My commission expires 10/31/76

(This is the document referred
to as "Court's exhibit 1"
in the May 10 transcript.)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant.

Civil Action

69 Civ. 200

PROPOSED ORDER AMENDING AND
CLARIFYING PRETRIAL ORDERS NOS. 2 AND 3

The parties having been heard, and the Court being
duly advised, it is hereby

ORDERED, ADJUDGED AND DECREED that, in plaintiff's
production of documents from Government files pursuant
to defendant's pending and any subsequent request for
the production of documents under the Federal Rules of
Civil Procedure, and specifically including the pending
production pursuant to Pretrial Orders Nos. 2 and 3,
the following procedures shall govern the production
and inspection until further order of this Court:

(1) Documents subject to a claim of statutory or
executive privilege shall not be produced at this time,
and resolution of any disputed claims of executive or
statutory privilege shall be deferred to the period
after all documents produced by plaintiff without
claims of privilege have been examined by defendant,
after all other methods of discovery have been com-
pleted, and after the issues have been finally defined
in pretrial proceedings;

THIS ORDER
ENTERED IN FULL
10 MAY 72

(2) Documents designated as containing sensitive commercial or proprietary information shall be made available for defendant's inspection and copying. Defendant shall take all steps necessary to prevent the disclosure of such documents or any information obtained from such documents to any person other than an attorney engaged in the conduct of this litigation and to persons assisting the said attorneys in the conduct of this litigation. Such documents and information shall be made available only to those persons that counsel deems necessary in the conduct of the litigation, and all attorneys and all such persons shall be notified of the entry of, and the terms of this Order before they are permitted access to any such documents or information, and each such attorney and each such person shall agree not to use such documents or any information contained in such documents for any purpose other than for use in this litigation;

(3) Documents designated as containing classified information may be examined on behalf of defendant only by duly authorized persons who have the requisite security clearances necessary for an examination of such classified material. All such materials and any copies thereof will be handled by defendant under appropriate security conditions until declassification has been effected;

(4) All documents responsive to Pretrial Orders Nos. 2 and 3, other than those documents included in items (1) through (3) above, shall be freely made available to defendant for inspection and copying,

subject to the reasonable convenience of the parties.

Dated at New York, New York, this day of
May, 1972.

DAVID N. EDELSTEIN
Chief Judge